No. 89-1070

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IN THE

# Supreme Court of the United States

October Term, 1989

JAMES MITCHELL TERRY,

*Petitioner,*

v.

COMMONWEALTH OF VIRGINIA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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## QUESTIONS PRESENTED

Whether the Supreme Court of the Commonwealth of Virginia should have granted *Habeas Corpus* on the following issues:

1. Whether the police can conduct a warrantless search to avoid the requirements of the Fourth Amendment to the United States Constitution by conducting that search through an agent purporting to utilize the provision of § 19.2-62 of the *Code of Virginia* (1950, as amended) set forth in the Appendix.

2. Whether the pleas of guilty to the charges of breaking and entering and rape were not "voluntarily" and "intelligently" made.

3. Whether the Appellant's claim of ineffective assistance of counsel is supported by the record.

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**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA**

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

James Mitchell Terry, the Petitioner herein, prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Virginia entered in the above entitled case on the 4th day of October, 1989.

## PRIOR OPINIONS REGARDING THESE PARTIES

JAMES MITCHELL TERRY

vs.

COMMONWEALTH OF VIRGINIA

Record No. 890689

Circuit Court No. L-21818-H.C

The order and opinion of the Circuit Court for the City of Chesapeake [unreported], which first denied *Writ of Habeas Corpus* to your Petitioner on the 14th day of October, 1988, is printed in Appendix "I". The decision of the Supreme Court of Virginia denying the Petition for appeal is printed in Appendix "II".

## JURISDICTION

The decision of the Circuit Court for the City of Chesapeake was entered on the 14th day of October, 1988. A timely appeal was denied by the Supreme Court of Virginia on the 4th day of October, 1989. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1257, set forth in Appendix "IV".

## CONSTITUTIONAL PROVISIONS

1. U.S. Const. Amend. IV:

The right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but from probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

2. U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, excepting cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled at any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. U.S. Const. Amend. XIV:

All persons born and naturalized in the United States, and subject to the jurisdictions thereof, are citizens of the United States and other states wherein they reside. No state shall make or enforce any law which shall bridge the privileges or immunities of citizens in the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law nor deny to any person within his jurisdiction equal protection of the laws.

## STATUTES

1. 28 U.S.C. § 2241 (1977). Text set forth in Appendix "III".

2. 28 U.S.C. § 1257 (1988). Text set forth in Appendix "IV".

3. 18 U.S.C. § 2511 (1979). Text set forth in Appendix "V".

4. 47 U.S.C. § 605 (1981). Text set forth in Appendix "VI".

5. Code of Virginia, § 18.2-61 (Repl. Vol. 1988). Text set out in Appendix "VII".

6. Code of Virginia, § 19.2-59 (Repl. Vol. 1983). Text set forth in Appendix "VIII".

7. Code of Virginia, § 19.2-62 (Repl. Vol. 1983). Text set forth in Appendix "IX".

8. Code of Virginia, § 19.2-299 (Repl. Vol. 1983). Text set out in Appendix "X".

## STATEMENT OF THE CASE

The Petitioner had lived with a former girlfriend, Denise Butt (hereinafter referred to as "Butt"). The Petitioner and Butt separated. Butt moved in with her sister, Susan Beede (hereinafter referred to as "Beede"). Butt and Beede lived in a trailer in the City of Chesapeake, Virginia. The Petitioner and Butt had continued their sexual relationship. Butt had invited the Petitioner to come to the trailer whenever he liked. The Petitioner, Butt, and Beede had known each other very well for over two (2) years. At the time of the alleged assault, Beede was estranged from her husband.

On or about the 29th day of March, 1986, at approximately 2:00 a.m., the Petitioner, pursuant to Butt's invitation, went to the trailer and found the same to be locked. The Petitioner climbed through a partially opened window, found Beede asleep, and awakened her. Without any objection, utterance, or sound from Beede, Beede and the Petitioner engaged in sexual relations, and the Petitioner left the trailer. Later that night, the police were called, and Detective Michael A. Slezak (hereinafter referred to as "Detective Slezak") conducted the initial investigation of Beede's charges. Beede denied knowing the identify of her alleged assailant.

Detective Slezak testified at the *Habeas Corpus* hearing that, upon his initial interview with Beede the night the alleged assault took place, he did not believe that she was being candid when she said she did not know who it was. He did not believe that Beede was telling him everything. He thought that she was withholding information, and he discussed her lack of cooperation with her the evening the alleged assault occurred.

Five days after the alleged assault and Slezak's initial investigation, Slezak again confronted Beede and told her he thought she knew who it was. During that interview, she said she thought it was the Petitioner.

At that time Detective Slezak, in his capacity as a Detective for the City of Chesapeake, conceived of the idea of placing a wiretap on Beede's telephone. (*Habeas Corpus* transcript, pages 83 and 84.) Slezak physically placed the wiretap on the phone himself. Slezak instructed Beede in how to operate the wiretap and had her record the subsequent conversation with the Petitioner. He also instructed Beede to dial the Petitioner's phone number and engage him in conversation and to keep him talking for as long as possible on the telephone. (*Habeas Corpus* transcript, page 84.)

When asked whether or not Slezak instructed Beede to tell the Petitioner that she was not going to prosecute to get him to talk, Slezak testified,

> I think probably what I told her is tell him anything to keep him on the telephone and keep him talking about what took place. (*Habeas Corpus* transcript, page 85.)

After the wire tapped conversation took place between Beede and the Petitioner, a transcript of that conversation was made. After Slezak listened to the wiretapped recording with the Commonwealth's Attorney, he then secured a warrant for the Petitioner's arrest.

**Slezak admitted he did not have a warrant for the wire tapped telephone conversation.** (*Habeas Corpus* transcript, page 86.) Time would have allowed Slezak to obtain a warrant for the wiretap had he sought a warrant from a magistrate.

Slezak's justification for a warrantless search was § 19.2-62 of the *Code of Virginia* (1950, as amended), which allows **private citizens** to tape their own conversations. Because Slezak, a detective in the Chesapeake Police Force, had asked Beede to conduct the search Slezak had conceived of, Slezak contended the Fourth Amendment's search and seizure requirements were circumvented by the Virginia legislation.

After Slezak arrested the Petitioner, the Petitioner denied that he had sexual intercourse with Beede until Slezak told him that the telephone conversation had been recorded. Then the Petitioner made a full disclosure of what took place. (*Habeas Corpus* transcript, page 86.) In all conversations that the Petitioner had with Slezak, he denied striking Beede. Detective Slezak also testified that he thought that the Petitioner denied threatening Beede's baby. (*Habeas Corpus* transcript, page 88.)

Following the Petitioner's confession to Detective Slezak, the Petitioner retained the services of Halbert Dail, an attorney who practiced in the City of Chesapeake. The Petitioner told Dail that Beede never resisted the sexual encounter, didn't speak, and never said a word. He further informed Dail that he did not threaten Beede's child or use any force or violence. (*Habeas Corpus* transcript, pages 108 and 109.)

Dail was aware that there had been a recording made of the wire tapped conversation, and he informed the Petitioner that the best way for him to proceed was to see a psychiatrist and that the Petitioner would probably get some kind of probation. (*Habeas Corpus* transcript, pages 110 and 111.)

During the *Habeas Corpus* hearing, the Petitioner introduced, through the representations to the Court of Dail, Dail's letter to Dr. Donald L. Mingione of Psychiatrist Associates, Ltd., dated June 16, 1986, which was introduced as Appellant's Exhibit 3. In that June 16, 1986, letter, Dail outlined his strategy of defense as follows:

> I believe that the only line of defense that I might be able to generate for this man, in midigation (sic) of his punishment, would be that he was **such a damaged spirit** (emphasis added) due to the abuse of his parents, that he may not have been in control of some irresistible impulse on the night of the alleged sodomy, rape and

> burglary. [Note: There was no burglary. There was a breaking and entering charge]. Also, if you have some opinion that would lead the Court to believe that that man could be treated in the community **without incarceration** (emphasis added), or should have mental treatment on an intensive inpatient (sic) environment, this would also be of interest to the Court.

On at least two or three occasions, Dail told the Petitioner that, **because no violence was involved** he would get probation if he followed the advice Dail was giving to the Petitioner. (*Habeas Corpus* transcript, page 119.)

During the *Habeas Corpus* trial, the Petitioner's mother, Vivian E. Pond (hereinafter referred to as "Pond"), testified on behalf of her son. Pond testified that on at least two occasions, once to Pond alone and once in front of a number of witnesses, Dail stated that he expected the Petitioner would be released on probation. (*Habeas Corpus* transcript, pages 93 and 94.)

In addition, Pond testified that Beede knew the Petitioner so well that there came a time when the Petitioner's live-in girlfriend, Butt, the Petitioner, Beede, and Beede's husband all had plans to live in the same two bedroom apartment and wanted Pond to help them make those arrangements at the apartment's rental office. (*Habeas Corpus* transcript, pages 95 and 96; NOTE: On page 96 of transcript, Denise Butt is erroneously referred to as Denise Beatty.)

Joyce T. Nash (hereinafter referred to as "Nash") appeared and testified at the *Habeas Corpus* hearing on behalf of the Petitioner. At the time of the trial of the Petitioner, Nash was named Joyce T. Condra. Nash also testified that, when she was interviewed by Dail, he told her they were going to get the Petitioner out on probation. (*Habeas Corpus* transcript, page 99.)

Additionally, Dail failed to coordinate the Petitioner's defense with the Petitioner and let him play a meaningful role in preparing his case for trial.

When the Court inquired whether or not the Petitioner fully understood the implication of the plea agreement, Dail stated, "We went over it several times within the hour." (August 29, 1986, transcript, page 11.) Dail, throughout the course of his representation of the Petitioner, prepared some of the most important and critical aspects of the Petitioner's defense at the courthouse shortly before the Petitioner's case was called. Dail, having admitted that he had just gone over the implications of the plea agreement "within the hour," then listened to the Court accept the Petitioner's pleas of guilty to rape and to breaking and entering.

The Court thereupon asked if there were a stipulation with regard to the evidence, and the Commonwealth's Attorney summarized a brutal rape in which an infant daughter of Beede was threatened with death and the purported victim was slapped and forced to have sex.

When asked whether the defense agreed with the Stipulation of Fact as presented by the Commonwealth, Dail stated, "Your Honor, apparently my client has taken **some stance with the facts**. (Emphasis added.) He said he didn't strike the girl nor threaten to kill the child." (August 28, 1986, transcript, page 13.)

The factual stipulation was never discussed with the Petitioner prior to that moment.

Dail made the foregoing representation as an officer of the Court.

At the *Habeas Corpus* hearing, Dail - incredibly - testified under oath **completely contrary** to his representations to the Court on August 28, 1986. Dail testified as follows:

> ...I can't remember the exact phrase, but it was something like he proceeded to force himself on her. And he did not go into any detail. The only violence that he ever admitted, physical

> violence, to me was he said that he struck the victim one time. I can't remember whether he said with his fist or with the back of his hand. The only other violence was verbal violence that he had made some threats in regard to doing injury to her. I can't remember what the exact threats were. (*Habeas Corpus* transcript, page 43.)

When asked to explain his inconsistencies between his representation as an officer of the Court and his testimony at the *Habeas Corpus* hearing, Dail tried to explain his inconsistencies with the following testimony:

> Well, as I recall I was standing there at the table with the man standing beside me. And we had discussed the stipulations. And during the time they were being stated the client was grabbing me by the arm saying "I didn't hit the girl. I didn't hit the girl." And that's why I said it. You can tell it is not my normal syntax. (*Habeas Corpus* transcript, page 62.)

After accepting the Petitioner's guilty pleas, the case was continued for a presentence report.

On October 16, 1986, the Petitioner was scheduled for sentencing. The Court inquired of Dail whether or not he had had an opportunity to go over the presentence report with the Petitioner. Dail represented to the Court as follows:

> I have had the opportunity. But I have not done so. I apologize with the Court....(October 16, 1986, transcript, page 4).

The Court then took a short recess to allow Dail to go over the presentence report with the Petitioner.

After a short consultation with the Petitioner, and without any prior preparation, the Petitioner was placed on the witness stand to testify. (October 16, 1986, transcript, page 7.)

Dail also called Dr. Donald Mingione, a practicing psychiatrist to testify about the Petitioner's brutalizing childhood, his self-destructive potential, and the fact that the Petitioner might be suicidal. (October 16, 1986, transcript, page 13.) This was part of Dail's "such a damaged spirit" defense strategy - a defense which, when coupled with the erroneous Factual Stipulation, completely and incontrovertibly prejudiced the Petitioner in the eyes of the Court.

In cross examining Dr. Mingione, the Commonwealth used the presentence report that had been prepared reflecting the Commonwealth's version of a vicious and violent rape with threats of death.

Dail had not gone over the presentence report with the Petitioner prior to the date of sentencing, and the Petitioner had not made any statement to the probation officer himself about what had happened on the night in question. Because Dail and the Petitioner had zero input into the presentence report, there developed at sentencing an "official version" of the night in question that reflected - without challenge - the threats, force, and violence disputed by the Petitioner. (October 16, 1986, transcript, page 22.)

At the sentencing, the Court was concerned with whether or not the "official version" of the events as reflected in the presentence report accurately reflected the threats, force, and violence that the report contained.

The Court actually used the phrase "official version" at sentencing. (October 16, 1986, transcript, page 102.) This "official version" of the events was the culmination of the defective plea agreement - the Factual Stipulation not agreed to. Dail should have required clarification of the facts in dispute at the time the Factual Stipulation and Plea Agreement were being made, and it became clear there was a major dispute that should have mandated a trial.

The Court, in questioning Detective Slezak, asked whether or not the Petitioner had admitted making statements about striking Beede, threatening to kill her child, and threatening Beede and the child. And the Court specifically inquired about the statement, "I will kill you."

Detective Slezak testified that he believed that the Petitioner acknowledged that statement, but he would have to check his notes. Detective Slezak was released so that he could go and get his notes and return to answer the Judge's questions about the threats. **Slezak was not recalled, and this ambiguity was never clarified in the original trial.** (October 16, 1986, transcript, pages 33, 34, and 35.)

When Detective Slezak was called at the *Habeas Corpus* hearing, he was asked whether or not the Petitioner ever stated that he had threatened to kill the baby, hurt the baby, had struck the victim or threatened the victim, and Detective Slezak testified that he had **always denied any of the threats or violence** and had specifically told Detective Slezak that he had **not struck the victim**. (*Habeas Corpus* transcript, page 87.)

When the Petitioner took the witness stand to testify at the sentencing, he was asked on cross examination specifically about the transcript of the wire tapped conversation. Using the following language, "And it wasn't until the detective confronted you with this very conversation that you finally admitted what you are willing to admit today that you did break, and you did rape, and you did sodomize. Answer Yes." (October 16, 1986, transcript, pages 78 and 79.) This is the fruit of the poisonous tree - the warrantless wiretap.

Throughout his direct testimony at the sentencing, the Petitioner steadfastly maintained that he had never threatened Beede or her baby and that he had never used any violence. The Petitioner maintained that Beede never said a word and either consented - or acquiesced - in the sexual conduct. They had known each other very well for two years.

In spite of the Petitioner's testimony, however, the entire transcript of the sentencing process keeps making reference to the presentence report that did not have any input

from the defendant or Dail and that had become the "official version" of the Court.

In the October 16, 1986, closing argument by Dail, he stated the following, "He never has - or in any great detail told me about the crime. He did tell me at all times as he told the Detective and he told the victim on the telephone conversation that he never struck the victim." (October 16, 1986, transcript, page 10.)

Before pronouncing sentence and after hearing all of the witnesses take the witness stand and testify, the Court made the following observation:

> And in so deciding where the offense should fall into the range of punishment the Court has to take those things into account. It is also mindful - and let me say this, notwithstanding what we have had is sort of admitted to a trial of this case today, one that perhaps might have been invited by the Court, but I wanted the defendant to have an opportunity if so desired to say what he wished to say about the official version.
>
> This case was not tried perhaps for a variety of reasons. I will accept the defendant simply did not want the case tried. He did not want to subject the victim to a trial.
>
> Now, obviously, he should not admit what he says is not a circumstance of the offense. The thing that troubled the Court initially about in reading the presentence report is the allegations concerning how the offense was committed. Taking into consideration defendant's own admission about how much he had to drink and the common sense evaluation of what his recollection about the details would be and

whether he would even want to remember such details, the Court concludes, and I don't think it can conclude otherwise, that basically what the victim has said is what in fact occurred...

It was perhaps despicable and reprehensible to an incomprehensible degree. Because if we are to believe the victim, and I do believe her, he in effect did not leave her the choice of whether to struggle or whether to even die rather than to submit to what he wanted to do. Because he threatened her child...

Notwithstanding some comments in the **official version** of some of the evidence that has been presented to the Court - and I attempted to in some way reach a conclusion in my own mind whether there was any other over - other overtone or any other kind of offense than a plain brutal rape. I find that there was not. **The defendant does not claim that there was.** (Emphasis added.) (October 16, 1986, transcript, pages 109, 110, and 111.)

## REASONS FOR GRANTING WRIT

### I

The State Court, in erroneously deciding Constitutional issues which go to the heart of established principles of fundamental justice, has committed a grievous error which should have been corrected on the Petitioner's Request for *Habeas Corpus*. The Supreme Court of the Commonwealth of Virginia, in refusing to grant the Petitioner's Petition for Writ

of *Habeas Corpus Ad Subjiciendum*, violated the Petitioner's constitutional rights, allowed a decision to stand which violated said rights, and conflicted with applicable decisions of the Supreme Courts of both the State of Virginia and the United States of America and the statutes of both the Commonwealth of Virginia and of the United States.

The most grievous error made in refusing to grant the Petition for Writ of *Habeas Corpus* and grant the Petitioner a new trial is in allowing a violation of the Fourth Amendment to the United States Constitution. The police cannot, acting either on their own or through their agents, circumvent or evade the requirements of the Fourth Amendment to the United States Constitution which protects the citizens of this country from unreasonable searches and seizures and avoid the necessity of obtaining a search warrant by attempting to follow § 19.2-62 of *Code of Virginia* (1950, as amended).

Section 19.2-62(b) makes a wiretap lawful if a private citizen wants to place a wiretap on his own phone. The idea to place the wiretap, however, must arise in the mind of that private citizen. Conversely, if the idea to place the wiretap on the phone of a private person arises in the mind of a police officer, and he then suggests to the private citizen that a wiretap be placed on that phone for the purpose of covertly conducting a search or seizure, the wiretap is illegal, and the private citizen has then become an agent for the police and the exclusionary rule should be applied [36 ALR 3d Private Search - Evidence IV, § 9(a)].

Section 19.2-62(1)(a) makes it a Class 6 felony where any person wilfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication...." Where the police officer plans to place a wiretap on a private citizen's phone and, thereafter, solicits that private citizen to place that tap on his phone for the purpose of making a search or seizure, that police officer has "procured another person to intercept or endeavor to intercept a wire or oral communication" in violation of § 19.2-62(1)(a).

Section 19.2-59 of the *Code of Virginia* provides that "No officer of the law or any other person shall search any place, thing, or person except by virtue of and under a warrant issued by a proper officer...." Detective Slezak evaded this statute drafted in conformity with the Fourth Amendment of the U.S. Constitution by misapplying, distorting, stretching, and using § 19.2-62 of the Virginia Code.

Although slightly different in wording, § 19.2-62 has Federal counterparts that are similar. 18 U.S.C. § 2511 allows "a person acting under color of law to intercept a wire or oral communication, where such person is a party to a communication or one of the parties to the communication has given prior consent to such interception." 47 U.S.C. § 605 also prohibits the unauthorized publication or use of wire tapped communications as occurred in this case.

To construe the above statutes to allow law enforcement officials to originate, in their own minds, the necessity for the use of a wiretap to conduct a search or seizure of oral communications and, thereafter, have those law enforcement officials solicit private parties to conduct oral examinations of a person under suspicion of having committed a crime, is to allow the Virginia General Assembly and the Congress of the United States to legislate away the protection afforded our peoples under the Fourth Amendment to the United States Constitution. Furthermore, it would allow the General Assembly to legislate away the opinion of the United States Supreme Court in *Katz vs. The United States*, 389 U.S. 347 (1967). That case involved a wiretap on a public telephone booth. In *Katz* the Supreme Court held that:

> [10]... Government's activities in electronically listening to and recording the Petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment.

In commenting on the failure to obtain a valid search warrant, the Supreme Court went on:

> It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionable showing probable cause", *Agnello vs. United States*, 269 U.S. 20, 33, 70 L. Ed. 145, 149, 46 S. Ct. 4, 51 ALR 409, for the Constitution requires "that the deliberate, impartial judgment of a judicial officer...be interposed between the citizen and the police..." *Wong Sun vs. United States*, 371 U.S. 471, 481-482, 9 L. Ed. 2d 441, 451, 83 S. Ct. 407. "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," *United States vs. Jeffers*, 342 U.S. 48, 51, 96 L. Ed. 59, 64, 72 S. Ct. 93, and that searches conducted outside the judicial process,

> without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions.... These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored "the procedure of antecedent justification...that is central to the Fourth Amendment", a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the Petitioner's conviction, the judgment must be reversed.

The police officer in this case was not under any time constraints, the Petitioner was not suspected of imminent flight, and the officer had ample opportunity to comply with § 19.2-59 of the *Code of Virginia* and go to a proper magistrate, present the evidence he had, and get the proper search warrant issued to validate the wiretap as required by the Fourth Amendment.

As noted in *Katz*, the scrutiny by a neutral magistrate could include the imposition or restraints on the way the officers would be allowed to conduct their wiretap. In this case, Beede was allowed to promise that the Petitioner would not be prosecuted when she told the Petitioner during the wire tapped conversation the following:

> Mickie: (long pause). What are you gonna do Susan?
>
> Susan: I'm not gonna do anything as long as you swear it'll never happen again! (pause).

Mickie: (crying) Please. Susan...Susan (crying) Are you sure your (sic) not taping this? (pause)

Susan: I'm possitive. (sic)

The police officer's illegal search without the prior intervention of a neutral magistrate and the issuance of a search warrant tainted all other aspects of the proceedings. This was the poisonous tree.

The only reason the Petitioner confessed to the crime was that he was confronted by the police officer who told him that the conversation, in complete contradiction to the positive assurance from Beede, had been taped and a transcript of that tape had been made. Only then did the Petitioner confess that he had had sexual relations with Beede.

The Petitioner's Fourteenth Amendment right to due process has also been violated. The Fourteenth Amendment requires fundamental fairness when it speaks of "due process of law." It requires competent counsel, searches based on properly issued search warrants, and basic honesty on the part of those conducting searches so as not to improperly mislead or trick citizens into abandoning their rights.

Due process of law is a summarized constitutional guarantee of respect for those personal immunities which are so rooted in the traditions and conscience of our nation as to be ranked as fundamental or implicit in the concept of ordered liberty. *Rochin vs. California*, 342 U.S. 165 (1952).

Protection of the individual from arbitrary action is the very essence of due process of law. *Slochower vs. Board of Higher Education*, 350 U.S. 551 (1956).

The activities of Slezak and Beede have been fundamentally unfair to the Petitioner. They tried to evade the Fourth Amendment to the United States Constitution and violated the spirit of due process - ignoring the Fourteenth Amendment.

## II

The plea of guilty to the charges of breaking and entering and rape was not made "voluntarily" and "intelligently" by the Petitioner. In *Boykin vs. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S.Ct. 1709, the United States Supreme Court considered whether or not a defendant voluntarily and intelligently entered a plea of guilty to a robbery charge, which, without more, would allow the trial judge to sentence the defendant to death. In that case the Court held:

> It was error, plain on the face of the record, for the trial judge to accept Petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary.

The Petitioner's pleas of guilty to breaking and entering and rape were not intelligently and voluntarily made by the Petitioner. The Petitioner thought that the factual summary of the Commonwealth's Attorney would be of a nonviolent, nonthreatening sexual intercourse. Instead, the factual summary was of a very violent rape wherein the alleged victim's infant daughter's life was threatened. The Petitioner tried to stop the entry of the pleas of guilty, but he could not get his trial attorney to stop the momentum of the proceedings, and the pleas of guilty were accepted erroneously.

In *Harlow vs. Murray*, 443 F. Supp. 1327 (1978), the United States District Court for the Western District of Virginia considered a Petition for *Habeas Corpus* wherein the Petitioner alleged that he had entered a plea of guilty under a short form indictment for murder without indicating the degree of murder with which the Petitioner was charged. The Petitioner entered a plea of guilty to the short form indictment. The Court then found the Petitioner guilty of first degree murder on both indictments and sentenced him to a total of 110 years in prison.

The question during the *Habeas Corpus* hearing was whether or not the Petitioner, in entering his plea of guilty, was admitting the key element of "premeditation." In *Harlow* the Court found that "Clearly a plea cannot be intelligently and voluntarily made when such a key element such as premeditation is admitted unwittingly."

In the instant case, the "key element" was the "force and violence" associated with the acknowledged sexual intercourse. This key element was never admitted by the Petitioner and was so crucial to the proceedings before the Trial Court that the plea of guilty cannot be found to have been made intelligently and voluntarily.

In *Henderson vs. Morgan*, 426 U.S. 637, 49 L. Ed. 2d 108, 96 S. Ct. 2253, the Court found that:

> (a plea of guilty) cannot support a judgment of guilt unless it was voluntary in a constitutional sense. And clearly the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process."

Because the Petitioner has at all times admitted that sexual intercourse occurred, but has maintained that Beede said not a word - never objected - to the sexual relations between the parties, his plea of guilty was not to the violent Factual Summary which erroneously accompanied the plea without the Petitioner's prior knowledge.

## III

The Petitioner did not receive effective assistance of counsel in the earlier proceedings against him. The Petitioner's first attorney utterly failed to get an agreement with the Commonwealth's Attorney on a proper Stipulation of Facts upon which the guilty plea was to be based.

When the Trial Court went through the standard questions before accepting the guilty plea, the Petitioner responded that he had not been promised anything and that he was satisfied with his counsel.

The truth of what then transpired came out in the *Habeas Corpus* hearing when counsel for the Petitioner asked Dail how he could explain his diametrically opposed representations to the Court: First, at the sentencing when he said that the Petitioner had not threatened nor struck the victim, and, second at the *Habeas Corpus* hearing when he testified under oath that the Petitioner had told him that he had both struck Beede with either his fist or the back of his hand and had threatened her and her child.

Dail testified as follows:

> Well, as I recall I was standing there at the table with the man standing beside me. And we had discussed the Stipulations. And during the time they were being stated the client was grabbing me by the arm, saying 'I didn't hit the girl. I didn't hit the girl.' And that is why I said it. You can tell it is not my normal syntax. (*Habeas Corpus* transcript, page 62.)

The specter we see is a Factual Stipulation gone wrong. Dail had not discussed with the Petitioner the stipulation prior to the entry of the guilty pleas. Because that had not been done, the Petitioner was grabbing at his attorney in open Court disputing the accuracy of the Stipulation that was being made and upon which the guilty pleas were being based

simultaneously with their utterance by the Commonwealth's Attorney. The guilty pleas were not "intelligently" or "knowingly" entered. They were entered through the Petitioner's ignorance and his attorney's incompetence.

After the acceptance of the guilty pleas, the case was continued until sentencing.

A presentence report was requested as allowed by statute, Dail's father died, and the Petitioner had no - not any - input into the presentence report. This presentence report summarized a vicious, violent rape with threats to the life of Beede's infant daughter and to Beede herself. This became the "official version" of what happened.

Dail failed to go over the presentence report prior to the time of the sentencing, and sentencing was delayed briefly to allow Dail to discuss it with the Petitioner. Even though the Petitioner maintained that he did not strike the girl, that denial was not contained in the presentence report which had become the "official version" of the events. Moments before sentencing the trial judge, referring to the "official version", said:

> ...I'm tempted to in some way reach a conclusion in my own mind whether there was any other over - overtone or any other kind of offense than a plain brutal rape. I find that there was not. **The defendant does not claim that there was.** (Emphasis added).

The factual stipulation supporting the guilty pleas was clearly disputed, but the Court considered only the "official version" of the events and believed that the Petitioner agreed that the sexual relations that had taken place were "a plain brutal rape." The entire confusion was the result of Dail's failure to properly inform the Petitioner of the Commonwealth's Attorney intended Stipulation of Facts.

In granting a *Habeas Corpus* petition, the United States Court of Appeals for the Fourth Circuit in *Nelson vs. Peyton*,

415 F.2d 115 (4th Cir. 1969), cert. denied, 397 U. S. 1007, 90 S.Ct. 1235, 25 L.Ed. 2d 240 (1970), found that the Petitioner in that case had not been advised of his right to appeal by his trial counsel and that the failure to so advise a defendant "is a clear indication that he was denied the effective assistance of counsel."

In *Nelson* the Court further cited *Gideon vs. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963), finding that a defendant is entitled to counsel "at **every stage** (Emphasis added.) of a criminal proceeding where substantial rights of a criminal accused may be affected."

Following the logic of *Nelson* the Petitioner had a right to be informed of the content of the Factual Stipulation that went along with the guilty plea. Had he been informed of the Factual Stipulation, the Petitioner would not have entered the pleas of guilty. Further, the Petitioner did not have any assistance of counsel during the time the presentence report was being prepared as an aid to the Court in sentencing. The Petitioner had no input into the presentence report.

Section 19.2-299 of the *Code of Virginia* (1950, as amended) gives a Defendant a right to a presentence report. He is entitled to review the same five (5) days prior to sentencing and is given the right to cross-examine the investigating officer. These rights were effectively denied to the Petitioner because of the death of Dail's father. Dail did nothing to prepare for the sentencing and did not inform the Petitioner that he had a right to have input into the presentencing report.

Without the Petitioner's knowledge or consent, Dail effectively waived any protection § 19.2-299 was designed to give the Petitioner. This is further evidence of ineffective assistance of counsel.

By not contesting the warrantless wiretap and by, essentially, agreeing to allow a transcript of the wiretap to be used at trial and serve as the basis of the guilty pleas, Dail allowed the Petitioner to become a witness against himself - a

violation of the Fifth Amendment to the United States Constitution.

This is particularly egregious and outrageous because the alleged victim was the Petitioner's long time friend and had promised him during the illegal wiretap that there was no tap on the phone, that she told the police she did not know the identity of her alleged assailant, and that she was not going to prosecute him ... "I'm not gonna do anything as long as you swear it'll never happen again!"

And Detective Slezak orchestrated the entire caper - with a wiretap he obtained from Radio Shack - using his surrogate, Beede, without a valid warrant.

## CONCLUSION

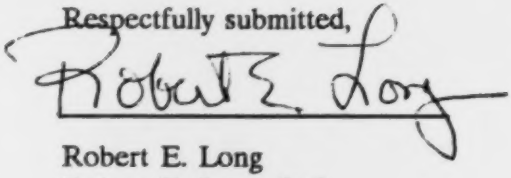
This case compels the attention of the highest Court in our land. The Virginia Supreme Court has sanctioned police conduct that abrogates - within the borders of the Commonwealth of Virginia - the Fourth Amendment to the United States Constitution in cases involving wiretap surveillance.

Because the Virginia statute that allows the circumvention of the Fourth Amendment to the Constitution - and the consequent loss of civil liberties to our peoples - has a federal counterpart that is substantially similar to the Virginia statute, this loss of protection afforded by the Fourth Amendment may, indeed, be prevalent throughout this great country.

Only the Supreme Court of the United States can restore, in this age of technology and electronic surveillance, the Fourth Amendment's protection against warrantless searches and seizures to the citizens of Virginia. In so restoring that right, this Court will be expanding that protection

across the nation to prevent similar abuses by the misapplication of the like federal statutes.

Respectfully submitted,



Robert E. Long
Robert E. Long, Ltd.
12 W. Queen's Way
Hampton, Virginia 23669

## APPENDIX I

VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF CHESAPEAKE

JAMES MITCHELL TERRY,
Petitioner,

v. AT LAW NO. 21818-H.C.

COMMONWEALTH OF VIRGINIA,
Respondent.

### ORDER

This proceeding came to be heard on April 5, 1988, upon the Petition of James Mitchell Terry for a Writ Of Habeas Corpus, the Petitioner appearing in person and by counsel, Robert E. Long, Esquire, and the Respondent appearing by Linwood T. Wells, Jr., Assistant Attorney General.

Upon consideration thereof, after hearing the evidence of the parties and the argument of counsel, the Court doth find for the reasons stated in its Memorandum Letter of October 14, 1988, attached hereto and by this reference made a part hereof, that the Petitioner is not entitled to the relief sought.

For the foregoing reasons, the Court is of the opinion that the Petition For A Writ Of Habeas Corpus should be denied and dismissed; it is, therefore,

ADJUDGED AND ORDERED that the Petition For A Writ Of Habeas Corpus be, and is hereby, denied and dismissed, to which action of the Court Petitioner notes his exceptions.

The Clerk is directed to forward a certified copy of this Order to the Petitioner, the Petitioner's counsel, Robert E. Long, Esquire, the Respondent, and Linwood T. Wells, Jr., Assistant Attorney General.

Entered this _____ day of October, 1988.

_____

Judge

I ask for this:

_____

Linwood T. Wells, Jr.
Assistant Attorney General

Seen and objected to:

_____

Robert E. Long

FIRST JUDICIAL CIRCUIT
OF VIRGINIA

JUDGES
William L. Forbes
Russell I. Townsend, Jr.

Post Office Box 16238
Chesapeake, Virginia 23320

October 14, 1988

Linwood T. Wells, Jr., Esquire
Assistant Attorney General of Virginia
Criminal Litigation Section
Supreme Court Building
101 North Eight Street
Richmond, Virginia 23219

Robert E. Long, Esquire
1 East Queen's Way
Hampton, Virginia 23669

Re: James Mitchell Terry v. Commonwealth of Virginia
At Law No. 21818-H.C.

Gentlemen:

This petition for habeas corpus refief (sic.) is before the Court on evidence heard ore tenus and the oral argument and written memoranda of Linwood T. Wells, Jr., Assistant Attorney General, and Robert E. Long, counsel for the petitioner.

Petitioner plead guilty to charges of rape and breaking and entering a dwelling house in the nighttime pursuant to a plea agreement.

With the exception of petitioner's assertion that he was not adequately represented by counsel, each ground alleged in support of his petition for relief involves an issue of fact or law which could have been contested had defendant elected to plead not guilty and stand trial. By pleading guilty, defendant has effectively waived any opportunity or right to contest these issues at a trial or on appeal unless he can demonstrate that his representation by counsel was so inadequate that his pleas of guilty were not voluntarily and intelligently entered.

The main thrust of petitioner's argument is that he plead guilty upon the advice of counsel because he had not been adequately advised relative to the strength of the defenses that he could present if he had plead not guilty. Petitioner contends that a recorded statement elicited from him over the telephone by the victim at the instance of the police was obtained in violation of his constitutional rights and provision of both federal and state statutes. He asserts that an inculpatory statement he gave to the police was given only after and because he became aware that the police had a recording of his telephone conversation with the victim. He argues that since both of these statements would have been subject to suppression if he had elected to stand trial that he could not have been convicted because there was no other evidence he was the criminal agent. Defendant was not in custody when he voluntarily talked with the victim by telephone and the conversation was recorded with her consent at her telephone. Under such circumstances, the Court finds defendant's assertion that the statement was obtained in violation of his constitutional rights and statutory law prohibiting the interception of communications to be without merit. Accordingly, defense counsel can not be found to have been

deficient in his representation of the petitioner for failing to advise him to assert such a defense.

The Court further finds petitioner's suggestion that he plead guilty because counsel had not sufficiently pointed out to him the distinction between consensual and non-consensual sexual activity to be incredible and unbelievable. A review of the recorded conversation and the statement given police leaves no doubt in the mind of the Court that petitioner knew the victim was not voluntarily submitting to his advances even if his version of the incident is accepted. The Court accepts defense counsel's testimony that petitioner told him he wanted to plead guilty no matter what counsel advised him. Counsel's credibility on this point finds support in the report of Gary F. Sigler and Norbert Newfield wherein Mr. Sigler states, "he told this examiner he feels compelled to plead guilty to all charges against the advice of his attorney."

Petitioner also complains that he was prejudiced by a stipulation of the facts presented by the Commonwealth's Attorney orally at the time he entered his pleas of guilty. However, the record reveals that defense counsel immediately advised the Court that petitioner disagreed with the statement of the Commonwealth's Attorney in that he denied he struck the victim or threatened to kill her child. Thereafter, the defendant persisted in his pleas of guilty. In assessing petitioner's understanding and motivation in pleading guilty and the adequacy of counsel's advice, the Court notes that the plea agreement provides that a third charge of forcible sodomy carrying a maximum penalty of life imprisonment was to nol prossed. (nol prossed pursuant to agreement on 10/16/86).

The Court concludes that petitioner has failed to substantiate any of his complaints concerning the competency of his attorney sufficient to demonstrate that he was denied the effective assistance of counsel in determining whether to plead guilty or not guilty to the charges. It is the further

opinion of the Court that petitioner has failed to demonstrate that defense counsel was otherwise so deficient in his investigation and preparation of the cases that petitioner was thereby prejudiced and entitled to the relief he seeks.

Accordingly, petitioner's request for habeas corpus relief is denied.

Very truly yours,

s/Russell I. Townsend, Jr.

Russell I. Townsend, Jr.

RITJr/mlc

P.S. The Court requests Mr. Wells to prepare the appropriate order in accordance with the Court's ruling.

## APPENDIX II

**VIRGINIA:**

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 4th day of October, 1989.

James Mitchell Terry, Appellant,

against Record No. 890689
Circuit Court No. L-21818-H.C.

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Chesapeake

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By: s/Robert Buriak
Deputy Clerk

## APPENDIX III

28 U.S.C. § 2241 (1977).

**§ 2241. Power to grant writ**

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless -

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof,

the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(June 25, 1948, c. 646, § 1, 62 Stat. 964; May 24, 1949, c. 139, § 112, 63 Stat. 105; Sept. 19, 1966, P. L. 89-590, 80 Stat. 811.)

## APPENDIX IV

28 U.S.C. § 1257 (1988).

**§ 1257. State courts; certiorari**

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

(June 25, 1948, ch 646, § 1, 62 Stat. 929; July 29, 1970, P. L. 91-358, Title I, Part D, Subpart 2, § 172(a)(1), 84 Stat. 590; June 27, 1988, P. L. 100-352, § 3, 102 Stat. 662.)

## APPENDIX V

18 U.S.C. § 2511 (1979).

**§ 2511. Interception and disclosure of wire or oral communications prohibited**

(1) Except as otherwise specifically provided in this chapter [18 USCS § 2510 et seq.] any person who-

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when-

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) (i) It shall not be unlawful under this chapter [18 USCS §§ 2510 et seq.] for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: Provided, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, communication common carriers, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law

to intercept wire or oral communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 [50 USCS § 1801], if the common carrier, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with-

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title [18 USCS § 2518(7)] or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No communication common carrier, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished an order or certification under this subparagraph, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any violation of this subparagraph by a communication common carrier or an officer, employee, or agent thereof, shall render the carrier liable for the civil damages provided in section 2520 [18 USCS § 2520]. No cause of action shall lie in

any court against any communication common carrier, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of an order or certification under this subparagraph.

(b) It shall not be unlawful under this chapter [18 USCS §§ 2510 et seq.] for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter [18 USCS §§ 2510 et seq.] for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter [18 USCS §§ 2510 et seq.] for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(e) Notwithstanding any other provision of this title [18 USCS §§ 1 et seq.] or section 605 or 606 of the Communications Act of 1934 [47 USCS § 605 or 606], it shall not be unlawful for an officer, employee, or

agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 [50 USCS § 1801], as authorized by that Act [50 USCS §§ 1801 et seq.].

(f) Nothing contained in this chapter [18 USCS §§ 2510 et seq.], or section 605 of the Communications Act of 1934 [47 USCS §§ 151 et seq.], shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications by a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 [50 USCS § 1801], and procedures in this chapter [18 USCS §§ 2510 et seq.] and the Foreign Intelligence Surveillance Act of 1978 [50 USCS §§ 1801 et seq.] shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act [50 USCS § 1801], and the interception of domestic wire and oral communications may be conducted.

(3) [Repealed]

(Added June 19, 1968, P. L. 90-351, Title III, § 802, 82 Stat. 213; July 29, 1970, P. L. 91-358, Title II, § 211(a), 84 Stat. 654; Oct. 25, 1978, P. L. 95-511, Title II, § 201(a)-(c), 92 Stat. 1796.)

Amendments:

1984. Act Oct. 30, 1984 (effective 60 days after enactment on 10/30/84 as provided by § 9(a) of such Act which appears as 47 USCS § 521 note), in para. (2), in subpara. (e), substituted "705 or 706" for "605 or 606", and in subpara. (f), substituted "705" for "605".

## APPENDIX VI

47 U.S.C. § 605 (1989) with amendments retroactive to 1986, date of alleged offense.

**§ 605. Unauthorized publication or use of communications**

Except as authorized by chapter 119, title 18, United States Code [18 USCS §§ 2510 et seq.], no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication

(or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public, or which relates to ships in distress.
(June 19, 1934, ch 652, Title VI, § 605, 48 Stat. 1103; June 19, 1968, P.L. 90-351, Title III, § 803, 82 Stat. 223.)

Amendments:
1982. Act Sept. 13, 1982, in the concluding sentence, deleted "broadcast or" following "communication which is"; substituted "any station" for "amateurs or others"; deleted "or" preceding "which relates"; and inserted ", or which is transmitted by an amateur radio station operator or by a citizens band radio operator".

1984. Act Oct. 30, 1984 (effective upon enactment on 10/30/84, as provided by § 5(b) of such Act), designated the existing provisions as subsec. (a); and added subsecs. (b)-(e).

(b) The provisions of subsection (a) shall not apply to the interception or receipt by any individual, or the assisting (including the manufacture or sale) of such interception or receipt, of any satellite cable programming for private viewing if-

(1) the programming involved is not encrypted; and
(2) (A) a marketing system is not established under which-
(i) an agent or agents have been lawfully designated for the purpose of authorizing private viewing by individuals, and
(ii) such authorization is available to the individual involved from the appropriate agent or agents; or

(B) a marketing system described in subparagraph (A) is established and the individuals receiving such programming has obtained authorization for private viewing under that system.

(c) No person shall encrypt or continue to encrypt satellite delivered programs included in the National Program Service of the Public Broadcasting Service and intended for public viewing by retransmission by television broadcast stations; except that as long as at least one unencrypted satellite transmission of any program subject to this subsection is provided, this subsection shall not prohibit additional encrypted satellite transmissions of the same program.

(d) For purposes of this section-

(1) the term "satellite cable programming" means video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for the retransmission to cable subscribers;

(2) the term "agent", with respect to any person, includes an employee of such person;

(3) the term "encrypt", when used with respect to satellite cable programming, means to transmit such programming in a form whereby the aural and visual characteristics (or both) are modified or altered for the purpose of preventing the unauthorized receipt of such programming by persons without authorized equipment which is designed to eliminate the effects of such modification or alteration;

(4) the term "private viewing" means the viewing for private use in an individual's dwelling unit by means of equipment, owned or operated by such individual, capable of receiving satellite cable programming directly from a satellite;

(5) the term "private financial gain" shall not include the gain resulting to any individual for the private use in such individual's dwelling unit of any programming for which the individual has not obtained authorization for that use; and

(6) the term "any person aggrieved" shall include any person with proprietary rights in the intercepted communication by wire or radio, including wholesale or retail distributors of satellite cable programming, and, in the case of a violation of paragraph (4) of subsection (d), shall also include any person engaged in the lawful manufacture, distribution, or sale of equipment necessary to authorize or receive satellite cable programming.

(e) (1) Any person who willfully violates subsection (a) shall be fined not more than $2,000 or imprisoned for not more than 6 months, or both.

(2) Any person who violates subsection (a) willfully and for purposes of direct or indirect commercial advantage or private financial gain shall be fined not more than $50,000 or imprisoned for not more than 2 years, or both, for the first such conviction and shall be fined not more than $100,000 or imprisoned for not more than 5 years, or both, for any subsequent conviction.

(3) (A) Any person aggrieved by any violation of subsection (a) or paragraph (4) of subsection [(e)] (d) may bring a civil action in a United States district court or in any other court of competent jurisdiction.

(B) The court-

(i) may grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations of subsection (a);

(ii) may award damages as described in subparagraph (C); and

(iii) shall direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails.

(C) (i) Damages awarded by any court under this section shall be computed, at the election of the aggrieved party, in accordance with either of the following subclauses;

(I) the party aggrieved may recover the actual damages suffered by him as a result of the violation and any profits of the violator that are attributable to the violation which are not taken into account in computing the actual damages; in determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation; or

(II) the party aggrieved may recover an award of statutory damages for each violation of subsec. (a) involved in the action in a sum of not less than $1,000 or more than $10,000, as the court considers just, and for each violation of paragraph (4) of this subsection involved in the action an aggrieved party may recover statutory damages in a sum not less than $10,000, or more than $100,000, as the court considers just.

(ii) In any case in which the court finds that the violation was committed willfully and for purposes of direct or indirect commercial advantage or private financial gain, the court in its discretion may increase the award of damages, whether actual or statutory, by an amount of not more than $100,000 for each violation of subsection (a).

(iii) In any case where the court finds that the violator was not aware and had no reason to believe that his acts constituted a violation of this section, the court in its discretion may

reduce the award of damages to a sum not less than $250.

(4) Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or is intended for any other activity prohibited by subsection (a), shall be fined not more than $500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both. For purposes of all penalties and remedies established for violations of this paragraph, the prohibited activity established herein as it applies to each such device shall be deemed a separate violation.

(5) The penalties under this subsection shall be in addition to those prescribed under any other provision of this title [47 USCS §§ 521 et seq.].

(6) Nothing in this subsection shall prevent any State, or political subdivision thereof, from enacting or enforcing any laws with respect to the importation, sale, manufacture, or distribution of equipment by any person with the intent of its use to assist in the interception or receipt of radio communications prohibited by subsection (a).

## APPENDIX VII

*Code of Virginia*, § 18.2-61 (1983).

**§ 18.2-61. Rape.** - If any person has sexual intercourse with a female or causes a female to engage in sexual intercourse with any person and such act is accomplished (i) against her will, by force, threat or intimidation, or (ii) through the use of the female's mental incapacity or physical helplessness, or (iii) with a female child under the age thirteen as the victim, he or she shall, in the discretion of the court or jury, be punished with confinement in the penitentiary for life or for any term not less than five years. (Code 1950, § 18.1-44; 1960, c. 358; 1972, c. 394; 1975, cc. 14, 15, 606; 1981, c. 397; 1982, c. 506.)

## APPENDIX VIII

*Code of Virginia*, § 19.2-59 (Repl. Vol. 1983).

**§ 19.2-59. Search without warrant prohibited, when search without warrant lawful.** - No officer of the law or any other person shall search any place, thing or person, except by virtue of and under a warrant issued by a proper officer. Any officer or other person searching any place, thing or person otherwise than by virtue of and under a search warrant, shall be guilty of malfeasance in office. Any officer or person violating the provisions of this section shall be liable to any person aggrieved thereby in both compensatory and punitive damages. Any officer found guilty of a second offense under this section shall, upon conviction thereof, immediately forfeit his office, and such finding shall be deemed to create a vacancy in such office to be filled according to law.

Provided, however, that any officer empowered to enforce the game laws may without a search warrant enter for the purpose of enforcing such laws, any freight yard or room, passenger depot, baggage room or warehouse, storage room or warehouse, train, baggage car, passenger car, express car, Pullman car or freight car of any common carrier, or any boat, automobile or other vehicle; but nothing in this proviso contained shall be construed to permit a search of any occupied berth or compartment on any passenger car or boat or any baggage, bag, trunk, box or other closed container without a search warrant. (Code 1950, § 19.1-88; 1960, c. 366; 1975, c. 495; 1976, c. 293; 1978, c. 721.)

## APPENDIX IX

*Code of Virginia*, § 19.2-62 (Repl. Vol. 1983).

**§ 19.2-62. Interception, disclosure, etc., of wire or oral communications unlawful; penalties; exceptions.** - (1) Except as otherwise specifically provided in this chapter any person who:

(a) Willfully intercepts, endeavors to intercept or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) Willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical or other device to intercept an oral communication;

(c) Willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication knowing or having reason to know that the information was obtained through the interception of a wire or oral communication; or

(d) Willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication; shall be guilty of a Class 6 felony.

(2) (a) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee or agent of any communications common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication; provided, that such communications common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks. It shall not be a criminal offense under this chapter for an officer, employee or

agent of any communications common carrier to provide information facilities or technical assistance to an investigative or law-enforcement officer, who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

(b) It shall not be a criminal offense under this chapter for a person to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. (Code 1950, § 19.1-89.2; 1973, c. 442; 1975, c. 495.)

## APPENDIX X

*Code of Virginia*, § 19.2-299 (Repl. Vol. 1983).

**§ 19.2-299. Investigations and reports by probation officers in certain cases.** - When a person is tried upon a felony charge, and is adjudged guilty of such charge, the court may, or on the motion of the defendant shall, before imposing sentence direct a probation officer of such court to thoroughly investigate and report upon the history of the accused and any and all other relevant facts, to the end that the court may be fully advised as to the appropriate and just sentence to be imposed. The probation officer, after having made same available to counsel for the accused by furnishing him with a copy of same for his permanent use at least five days prior thereto, shall present his report in open court in the presence of the accused who shall have been advised of the contents of the same and be given the right to cross-examine the investigating officer as to any matter contained therein and to present any additional facts bearing upon the matter which he may desire to present. The report of the investigating officer shall be filed as a part of the record in the case. Notwithstanding any provision of law to the contrary, any report so filed shall be sealed upon the entry of the sentencing order by the court and made available only by court order, except that such reports or copies thereof shall be available at any time to any criminal justice agency, as defined in § 9-169, of this or any other state or of the United States for any lawful purpose, and shall be made available to counsel for any person who has been indicted jointly for the same felony as the person subject to the report. Any report prepared pursuant to the provisions hereof shall without court order be made available to counsel for the person who is the subject of the report if that person is charged with a felony subsequent to the time of the preparation of the report. On and after January 1, 1982,

in any case where a presentence report is ordered pursuant to this section, it shall be in a form prescribed by the Department of Corrections. In all cases where such report is not ordered, a simplified report shall be prepared on a form prescribed by the Department of Corrections. (Code 1950, § 53-278.1; 1952, c. 233; 1972, c. 516; 1974, c. 121; 1975, cc. 371, 495; 1979, c. 286; 1980, c. 733; 1981, c. 263; 1983, c. 541.)